United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

76-7005

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-7005

EAST HARTFORD EDUCATION ASSOCIATON, ET AL
Appellants

v.

BOARD OF EDUCATION OF THE
TOWN OF EAST HARTFORD, ET AL
Appellees

On Appeal From the United States District Court for the District of Connecticut

BRIEF FOR THE APPELLEES
ON EN BANC RECONSIDERATION

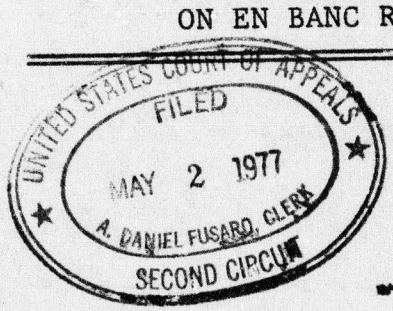

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TABLE OF CONTENTS

TABLE OF CASES AND MISCELLANEOUS AUTHORITY

PRELIMINARY STATEMENT

Defendants-appellees have already thoroughly stated their argument in their brief submitted to the original panel. The dissenting opinion of Judge Meskill accurately and completely reflects the position taken by defendants-appellees. Therefore, we will not reiterate the arguments advanced before, but direct our attention to the positions taken by the majority opinion and the appellants in their latest brief.

ARGUMENT

1. The majority opinion mistakenly relies upon the "liberty" interest in the Fourteenth Amendment to invalidate the Board's dress code.

In reaching its conclusion that the Dress Code is constitutionally impermissible, the majority opinion relies to at least some extent upon the purported "liberty interest" of

Brimley in being free from "all substantial arbitrary impositions and purposeless restraints." Slip opinion at 1862-1863. Scanty legal authority is invoked to support this unique application of substantive due process. Arguing from privacy cases such as Roe v. Wade, 410 U.S. 113 (1973) and Griswold v. Connecticut, 381 U.S. 479 (1965), which involved conception and procreation, the majority concludes that the "right to control one's own body . . . extends in the minds and hearts of many individuals to the body's teguments, be they clothing or hair." Slip opinion at 1860.

The majority's appeals to fears of a "uniformed citizenry," marching in abject servitude to the tune played by their Manchu overlords, do little to support their argument in this case. Here an employee of local government is required to wear during the hours of his employment clothing (not a uniform) which the school board, as a matter of

educational policy, deems to be rationally related to the goals of maintaining respect, discipline and decorum in the classroom. Miller v. School District 167, 495 F.2d 658, 664 (7th Cir. 1974). Tardif v. Quinn 545 F.2d 761, 763 (1st Cir. 1976). Even assuming some "liberty" interest of a public school teacher appearing as he pleases during working hours, this interest is easily outweighed by the educational objectives sought to be achieved by the school board.

2. The reliance in the majority opinion upon a First Amendment right of academic freedom is not supported by case law or theory.

The majority opinion also relies upon a vaguely defined theory of academic freedom to buttress its conclusion that the dress code is constitutionally invalid. Reasoning from cases arising out of a totally different factual context, the majority argues that:

> "There is, as we see it, a sharp distinction between content of curriculum and pedagogical methodalogy . . . As long as the substantive values that the school board seeks to inculcate are not subverted by the way in which a teacher wishes to communicate with his students, . . . the teacher's freedom to choose teaching methods is entitled to be weighed in the constitutional scales." Slip opinion at 1865.

The cases relied upon by the majority do not themselves articulate a thorough-going theory of academic freedom, but generally rely upon some other ground for deciding the case, such a denial of the free exercise of religion, Epperson v. Arkansas, 393 U.S. 97, 106 (1968), or denial of due process, Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969), or upon the denial of free speech on some matter of political importance or public controversy. Birdwell v. Hazelwood School District, 491 F.2d 490, 494 (8th Cir. 1974), relying upon Pickering v. Board of Education, 391 U.S. 563 (1968). Even Prof. Emerson, a staunch advocate and expansive interpreter of

the theory of academic freedom, acknowledges that the Supreme Court's approach in this area has been "superficial" and that the Court has invariably sought to base its opinions on grounds other than academic freedom. T. Emerson, The System of Freedom of Expression 616 (1970).

The majority's attempted characterization of Brimley's dress as mere "pedagogical methodology" rather than substantive curriculum content begs the entire issue in this case. The attempt to segregate form from content in a case such as this is at best extraordinarily difficult. As the majority concedes:

> It is a truism that, long after a student's substantive knowledge has been forgotten, it is the character of a good teacher--of which appearance and style are inevitably a part--that is most remembered and that continues to inspire. Slip Opinion at 1866.

The school board justifiably relates the importance of "appearance and style" to

the education of its students. While it would not object to Brimley's discussion of non-conformist life style in the context of the curriculum to be taught, it does object to the attempt by Brimley to make his own determination of what style of dress is an appropriate role model for students in East Hartford Public Schools. Compare Cohen v. California, 403 U.S. 15, 18 (1971). The invocation of academic freedom should not automatically dispel the rights of the school board to prescribe educational standards, even if reasonable men might argue the policy merits of such standards.[1] Appellants'

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[1] Teaching style has always been considered an integral part of curriculum. PLOWDEN REPORT (1967), "Children and their Primary Schools," report of the Central Advisory Council for Education (England), which advocated an informal teaching style to improve learning levels. More recently, Neville Bennett, Teaching Styles and Pupil Progress 152-155, Harvard University Press (1976), has argued that "formal" or "traditional" teaching styles result in higher achievement. Such areas of educational policy are of vital

repeated assertions that the Board wishes to "indoctrinate" students with a particular point of view is fallacious. The Board seeks to establish a learning environment which produces high achievement levels and which includes a role model which will help to prepare students for the business and professional community. Students are not required to follow this example; they are free to accept or reject it.

3. Brimley's dress is not speech and is not entitled to First Amendment protection.

Although the majority opinion does not adopt this argument, appellants contend that Brimley's non-conformist dress is "symbolic" speech, in that his tielessness is intended to convey his rejection of "many of the customs and values of the older generation,"

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1 cont'd.

concern to the Board and should not be left to the determination of each individual teacher.

that he is not "tied to establishment conformity," and that "he sympathizes with the values of the students' generation." Brief for the Appellants on En Banc Reconsideration at 3. As was argued in Appellees' Brief and in Judge Meskill's dissent, Brimley's dress is not speech; but even assuming that the conduct involved here has some speech component, Brimley's choice of dress falls toward the conduct end of the speech-conduct continuum, and as such, is not entitled to the full scope of First Amendment protection.

First Amendment protection has been accorded "expressive conduct" only in cases where the act involved political dissent. Tinker v. DesMoines School District, 393 U.S. 502 (1969); James v. Board of Education, 461 F.2d 566 (2d Cir. 1971); but cf. United States v. O'Brien, 391 U.S. 367 (1968). Here, the conduct, even assuming it has some speech component, is only remotely (if at all)

related to any matter of political or public controversy. Compare Pickering v. Board of Education, 391 U.S. 563 (1968). It represents merely plaintiff's differing view as educational policy.

Appellants argue that because the dissent suggests that wearing a tie is an expressive act, that it follows ipso facto that tielessness is a First Amendment act entitled to protection. The board's right to require accepted business dress is not based upon any First Amendment theory, but rather its statutory right to set educational policy. For example, the right to select certain books for classroom use does not mean that the board does so as a First Amendment right, nor does this selection authorize the teacher to refuse to use the book in the exercise of his First Amendment free speech rights. See Presidents Council, District 25 v. Community School Board No. 25, 457 F.2d 289, 292 (2d Cir. 1972). The fact

that the carrying out of an educational policy necessarily involves communication does not, by turning the argument on its head, mean that the employee may refuse to participate in this communication on some First Amendment free speech ground.

Even if it were concluded that Brimley's conduct contains some speech element, the board's reasons for its dress code so easily outweigh this minimal right that no triable issue is presented. Brimley has other means of expressing his non-conformity which do not infringe upon the Board's legitimate rights to set educational policy.

CONCLUSION

Appellee East Hartford Board of Education are not seeking to prohibit Brimley from expressing his non-conformist ideas to his class, so long as he does so in a manner which does not impede his teaching functions

as assigned by the Board of Education, both in the areas of subject matter and style.[2] The burden is on the appellants to demonstrate that such regulation is "so arbitrary as to be branded irrational," Kelly v. Johnson, 425 U.S. 238, 248 (1976), or that "that invasion (of his rights is) so irrational as to demonstrate a lack of good faith." Tardif v. Quinn, supra at 764. Appellees contend that as a matter of law this burden of proof cannot be met.

Respectfully submitted,
Appellees

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[2] It should be noted that Brimley has not complied with the Dress Code during the pendency of this action, contrary to the majority's assertion. Slip Opinion at 1858. See Hartford Courant, February 27, 1977, Interview with Richard P. Brimley ("I've only worn a tie once this year.")

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Appellees were deposited in the United States mails, postage prepaid, this 2nd day of May, 1977, addressed to the following:

Martin A. Gould, Esquire
37 Lewis Street
Hartford, Connecticut 06103

By Coleman H. Casey